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No. 75-1599

In the Supreme Court of the United States

OCTOBER TERM, 1975

ARNOLD ZAGER, ET AL., PETITIONERS

v.

W. J. USERY, JR., SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 42-43) is not reported. The district court's findings of fact and conclusions of law of October 23, 1973 (Pet. App. 15-22), order of November 7, 1973 (Pet. App. 22-23), and memorandum opinion of March 12, 1975 (Pet. App. 24-36) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1975. On March 23, 1976, Mr. Justice Stewart extended the time in which to file a petition for a writ of certiorari to May 3, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the district court correctly concluded that petitioners violated several provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*

STATEMENT

Petitioners own and operate a restaurant-delicatessen, wholesale food distributorship and bakery in Nashville, Tennessee. The various components of the business are closely integrated and are managed and coordinated at a central office. Moreover, the business regularly purchases and receives goods from out-of-state suppliers and purchases and receives from local suppliers a substantial volume of goods that have moved in interstate commerce (Pet. App. 16-17).

In April 1973, the Secretary of Labor brought suit to enjoin petitioners from violating Section 15(a)(2), (3), and (5) of the Fair Labor Standards Act of 1938, 52 Stat. 1068, as amended, 29 U.S.C. 215(a)(2), (3), and (5), and to restrain petitioners from withholding payment of wages due certain of their employees under the Act (Pet. App. 15). After a trial before the United States District Court for the Middle District of Tennessee, petitioners were found to have willfully violated the Act by paying their employees straight weekly wages for hours worked in excess of 40 per week, discharging an employee who asserted her rights under the Act, suffering or permitting a person to work a substantial number of hours without pay, requiring bakery workers to fill out their time cards without regard to the actual number of hours worked, and improperly reducing the earnings of waitresses by the amount of their tips (Pet. App. 24-36). Petitioners were ordered to compensate their employees at no less than the minimum wage for a work week of

40 hours or less and at one and one-half times the regular rate for work in excess of 40 hours, to keep and preserve accurate wage, hour and other records as required by the Act, and to make specified awards of back pay, totaling $32,503.39, to 21 of their employees (Pet. App. 36-41). The court of appeals affirmed (Pet. App. 42-43).

ARGUMENT

Petitioners contend that the district court erred in determining that their business generated a sufficient dollar volume of sales to be subject to the Act and in concluding that the evidence supported the Secretary's charge that they had violated several provisions of the Act. Each of these factual contentions was rejected by the court of appeals, which correctly concluded that the trial court's findings were not clearly erroneous. Rule 52(a), Fed. R. Civ. P. There is no need for further review. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

1. Petitioners contend (Pet. 5-8) that their restaurant qualified as an exempt retail establishment under Section 13(a)(2) of the Act, 29 U.S.C. 213(a)(2), because its annual dollar volume of sales was less than $250,000. The trial court found, however, that the restaurant-delicatessen and the "food delicacies" distribution business, both of which were operated at the same location, were "highly integrated, both physically and functionally, and comprise a single business establishment with an annual dollar volume of sales in excess of $250,000" (Pet. App. 21-22). This conclusion was correct, since the evidence showed that the several businesses operated by petitioners utilized common management, common purchasing, common operational equipment and facilities, common bank accounts, and, when necessary, common personnel (Pet. App. 16-17). It was therefore proper to consider their

combined sales in determining the applicability of the Act. See, *e.g.*, *Gilreath* v. *Daniel Funeral Home, Inc.*, 421 F. 2d 504, 508-510 (C.A. 8); *Acme Car & Truck Rentals, Inc.* v. *Hooper*, 331 F. 2d 442, 445 (C.A. 5); *Mitchell* v. *Gammill*, 245 F. 2d 207, 211 (C.A. 5). Cf. *Wirtz* v. *Columbian Mutual Life Ins. Co.*, 380 F. 2d 903, 909 (C.A. 6).[1]

2. Petitioners claim (Pet. 8-9) that the district court erred in holding that their restaurant's waitresses did not earn more than $20.00 per month in tips and hence were not "tipped employees" within Section 3(m) and (t) of the Act, 29 U.S.C. 203(m) and (t). But petitioners concede (Pet. 9) that several waitresses testified that they never received more than $20.00 per month in tips, and the trial court was entitled to credit this testimony.

3. Petitioners challenge (Pet. 10-11) the district court's findings that Mary Hall, a bakery and restaurant employee, was discharged for having asserted her rights under the Act. The evidence at trial showed that after petitioners had delivered back pay checks to certain of their employees under a settlement agreement with the Department of Labor, petitioner Jack Zager told Mrs. Hall to return the check "or else" (Pet. App. 26). Mrs. Hall testified that she

[1]Although petitioners suggest (Pet. 6) that the value of goods supplied to the Scottish Rite Temple should not have been included in the restaurant's annual dollar volume because the food was delivered as a "civic duty," the Act defines "sale" to include "any sale, exchange * * * or other disposition" (Section 3(k), 29 U.S.C. 203(k)). Cf. *Wirtz* v. *Allen Green & Associates, Inc.*, 379 F. 2d 198, 200 (C.A. 6). The applicability of the Act's wage standards depends not on the profitability of operations but on their relationship to interstate commerce (*Public Bldg. Authority of Birmingham* v. *Goldberg* 298 F. 2d 367, 370 (C.A. 5)), and "the fact that [accommodation sales] were made without profit did not change their legal aspect; they involved work operations which [the] employees were engaged to perform * * *." *Northwestern-Hanna Fuel Co.* v. *McComb*, 166 F. 2d 932, 937 (C.A. 8).

interpreted this threat to mean that she was discharged since she had already cashed the check, and that when she reported to pick up her last pay check petitioner Zager told her that he "didn't need her business" (Pet. App. 26-27). Moreover, other witnesses testified that petitioner Zager had also asked them to return their money under the settlement and that his demand had been coupled with a threat to their employment (Pet. App. 27). On this record, the trial court reasonably concluded that Mrs. Hall had been improperly discharged, in violation of Section 15(a)(3) of the Act, 29 U.S.C. 215(a)(3), for refusing to return wages to which she was lawfully entitled. See *Brennan* v. *Maxey's Yamaha, Inc.*, 513 F. 2d 179, 181 (C.A. 8).

4. Nor does the record support petitioners' claim (Pet. 11-12) that, although Louise Overton assisted her husband at the bakery for five weeks, they were not aware of her employment. The district court's finding to the contrary was adequately grounded on the testimony of Mrs. Overton and her husband that petitioners knew of her work (A. 164)[2] and had given it their permission (A. 163-164), and that petitioners had at one point discussed paying Mrs. Overton for her services (A. 164, 181-182). See *Burry* v. *National Trailer Convoy, Inc.*, 338 F. 2d 422, 426 (C.A. 6); *Wirtz* v. *Leonard*, 317 F. 2d 768, 769 (C.A. 5). In any event, apart from this proof of petitioners' direct knowledge of Mrs. Overton's presence as an employee in the plant, the court properly concluded that petitioners had "suffered or permitted" Mrs. Overton to work for them within the meaning of Section 3(g) of the Act, 29 U.S.C. 203(g). It is sufficient under that section if petitioners could have known of Mrs. Overton's presence

[2]"A." refers to the appendix in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

if they had "inquire[d] into the conditions prevailing in [their] business." *Gulf King Shrimp Co.* v. *Wirtz*, 407 F. 2d 508, 512 (C.A. 5). See also *Lenroot* v. *Interstate Bakeries Corp.*, 146 F. 2d 325, 328 (C.A. 8).[3]

5. The district court's conclusion (Pet. App. 25-26) that petitioners required their bakery employees to record a set number of hours on their time cards without regard to the actual number of hours worked is also supported by the record. Although petitioners seek to reargue the evidence (Pet. 12-13), the court's finding of liability, and of the amounts of the resulting underpayments, was based on the testimony of several employees (A. 177, 190-191, 201-202, 218, 227-228) as well as of the Department's compliance officer (A. 289-294). See Resp. Exh. 5 (A. 436-437). See also *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-688; *Hodgson* v. *American Concrete Construction Co., Inc.*, 471 F. 2d 1183, 1185-1186 (C.A. 6).

6. Petitioners allege (Pet. 13-14) that the actual value of the meals provided to their employees exceeds the $0.52 allowed by the district court under Section 3(m) of the Act, 29 U.S.C. 203(m). But since petitioners did not maintain the records of cost required by the applicable regulations (29 C.F.R. 531.28), did not request a determination of fair value by the Secretary pursuant to Section 3(m), and did not adduce objective evidence to substantiate their estimate of cost, the court was justified in accepting the testimony of the Department's compliance officer, who

[3] *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, is not to the contrary. The Court there held that Section 3(g) of the Act did not apply to an employer who provided free instruction to trainees, even though they would later be eligible for hiring as employees. Unlike the employer in that case, who received "no 'immediate advantage' from any work done by the trainees," *id.* at 153, petitioners were directly benefited by Mrs. Overton's services.

stated that his investigation of comparable restaurants showed an average cost of 52 cents per meal (Pet. App. 31).

7. Finally, petitioners challenge (Pet. 14) the trial court's determination that their violations of the Act were willful. Their present assertion of innocence, however, is incompatible with the findings that petitioners directed their employees to understate their working time on the records used for computing wages and threatened to discharge employees who refused to return back pay under a settlement agreement with the Secretary. See pp. 4-5, 6, *supra*.

Moreover, it is immaterial whether an employer knows that his actions are prohibited by the Act. It is sufficient if he is aware that the Act applies to him and if he makes no effort to ascertain his obligations under its provisions. See *Brennan* v. *Air Terminal Parking of Columbia, Inc.*, 498 F. 2d 1397 (C.A. 4), affirming 72 CCH Lab. Cas. para. 32,979 (D. S.C., October 15, 1973); *Brennan* v. *Heard*, 491 F. 2d 1, 3 (C.A. 5); *Coleman* v. *Jiffy June Farms, Inc.*, 458 F. 2d 1139, 1142 (C.A. 5), certiorari denied, 409 U.S. 948. Here, petitioners knew that the Act applied to their operations, having already been required to award back pay to their employees under a settlement following a previous investigation by the Secretary (Pet. App. 25). Although petitioners contend that they relied on the compliance officer's determination in that investigation that the restaurant-delicatessen operations were exempt (Pet. 14), that determination, as the trial court found, was an error resulting from petitioners' failure to provide information that they had a duty to disclose (Pet. App. 24-25).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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